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No. 88-500

In the Supreme Court of the United States

OCTOBER TERM, 1988

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Interstate Commerce Commission's decision, under the discretionary authority granted to it by Congress in 49 U.S.C. 10505, to reduce the regulatory burdens associated with the abandonment of railroad track where no shippers will lose rail service.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-41a) is reported at 848 F.2d 1246. The decision of the Interstate Commerce Commission (Pet. App. 99a-113a) is reported in *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146.

JURISDICTION

The judgment of the court of appeals was entered May 24, 1988. Petitioner sought and received an enlargement of the time in which to file a petition for

a writ of certiorari to and including September 21, 1988, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, a rail carrier generally must offer, and upon request provide, service to shippers on a rail line, unless it has first obtained abandonment authority from the Interstate Commerce Commission (ICC or Commission) in a proceeding brought pursuant to 49 U.S.C. 10903 *et seq.* In such a proceeding, the Commission must determine whether "the present or future public convenience and necessity require or permit the abandonment" (49 U.S.C. 10903(a)). In making this determination, the Commission balances the need of shippers and communities for the line against the burden that the line imposes on the carrier and interstate commerce. See *Colorado* v. *United States*, 271 U.S. 153, 168 (1926). A carrier must ordinarily give advance notice of its intent to abandon by marking the proposed abandonment on its system diagram map at least four months before it files the detailed application necessary to have a request for abandonment authority considered by the ICC (49 U.S.C. 10904(e)(3)).

Under 49 U.S.C. 10505, as modified by the Staggers Rail Act of 1980, Pub. L. No. 96-448, Title II, § 213, 94 Stat. 1912, the Commission is authorized to exempt a t ansaction or class of transactions from its regulation when it finds that (1) the regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101a, and (2) either (a) the transaction is of limited scope, or (b) the regulation is not needed to protect shippers from the abuse

of market power. Section 10505 was enacted because Congress believed that while it had been able "to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress." H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980). Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed [through the use of Section 10505] and that the Commission will adopt a policy of reviewing carrier action after the fact to correct abuses of market power" (*ibid.*).

2. In 1983, the ICC exercised the discretionary power Congress gave it in Section 10505 by issuing a class exemption that excused rail carriers of "out of service" rail lines—those lines which have generated no local traffic for at least two years and which are not needed for continued service to shippers on any other lines—from the regulatory procedures otherwise required before the rail carrier can abandon those lines. 49 C.F.R. 1152.50; see *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) (Pet. App. 83a-93a); see also *Exemption of Out of Service Lines*, 1 I.C.C.2d 55 (1984) (Pet. App. 94a-98a) (extending class exemption to rail carriers discontinuing use of out of service lines). Under the exemption, carriers need not provide four months advance notice through modification of the system diagram map, but can file a simplified notice and obtain abandonment authority within approximately 60 days (absent an investigation and possible revocation of

the exemption in particular cases) (49 C.F.R. 1152.50(d), 49 U.S.C. 10505(d)).

In April 1986, the court of appeals for the District of Columbia Circuit found that the Commission had inadequately analyzed several factors of rail transportation policy implicated by this class exemption and that the ICC order was therefore deficient under the applicable standards of the Administrative Procedure Act (5 U.S.C. 706(2)(A)). *Illinois Commerce Commission* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986). The court vacated the ICC's order in *Exemption of Out of Service Rail Lines*, and remanded the case for further proceedings.

In November 1986, the Commission readopted the exemption after fully considering the issues which had prompted the remand. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (Pet. App. 99a-113a). As relevant to the issues raised in the instant petition, the agency first determined (Pet. App. 101a-102a) that the exemption would not allow carriers to charge excessive rates where there is no competition. It explained (*ibid.*) that an exemption allowing abandonment or discontinuance of service by a carrier over one rail line does not remove any market or regulatory rate restraints on any other traffic. It further noted (*ibid.*) that effective competition will assure reasonable rates on service that is continued; and that, where competition is inadequate, Commission rate regulation will remain available. The Commission also specifically answered (*id.* at 102a) the concern that the exemption would have an adverse rate impact because the lines abandoned could no longer serve as a basis for constructing favorable "short line rates" for *other* traffic. It explained that carriers could still practice

"short line ratemaking," according to which a shipper is given a low rate based on a fictitious "short line" of travel different from the actual route traveled, even if the carriers have abandoned or discontinued the route on which the rate was originally based.

Second, the Commission addressed (Pet. App. 105a-108a) the court's concern that the ICC had not adequately considered the need for cooperation with the states to assure the regulation of intrastate transportation in accordance with the Interstate Commerce Act (see 49 U.S.C. 10101a(9)). The Commission explained (Pet. App. 106a-107a) that, because the exempt abandonments would not result in any loss of service to shippers, they were unlikely to be of importance to a state's business economy. It also noted (*id.* at 106a-108a) that the states could monitor the use of those sections of rail line they consider crucial and that, in any case, the states are given a minimum of 60 days' notice to allow them to protest the use of the exemption or to prepare offers of financial assistance under Section 10905 for particular lines.

3. Petitioner again sought review in the Court of Appeals for the District of Columbia Circuit, and the court affirmed. Recognizing that the Commission must balance "various (and at times competing) elements of the rail transportation policy" in an exemption proceeding (Pet. App. 16a-17a n.15), the court discussed each challenge to the ICC's treatment of the various RTP factors. As relevant here,[1] the court

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[1] Petitioners challenge only those findings that concern the RTP factors dealing with the reasonableness of rail rates and cooperation with the States.

upheld (*id.* at 12a) the Commission's finding that the exemption would not affect the agency's ability to assure reasonable rates. The court agreed (*id.* at 11a) with the Commission that "the abbreviated abandonment procedures have little if anything to do with a carrier's ability, obligation, or incentive to continue offering a particular rate." As the court noted (*ibid.*), "short line ratemaking" is completely voluntary and may be based even on an abandoned line if a tariff is filed to that effect. And the court specifically rejected (*id.* at 11a-12a) petitioners' claim that rates can be unreasonable even if beyond the Commission's power to regulate, explaining that in the absence of market dominance all rates are presumed to be reasonable.

The court also held (Pet. App. 14a-17a) that the exemption was consistent with the RTP goal of cooperation with the states in transportation matters. The court noted (*id.* at 16a) that the financial assistance procedures and the 60 days' notice period represent a reasonable accommodation to the needs of states given that this particular class of abandonments concerns lines that have generated no local traffic for two years, carry only overhead traffic that can be rerouted, and thus involve transactions that are generally noncontroversial.[2] The court concluded (*id.* at 15a) that the agency had provided a "thorough and well-reasoned explanation" that justified its determination in the face of the various objections raised by the states.

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[2] Of the first 200 transactions governed by the exemption, only 10 generated any opposition (Pet. App. 15a).

ARGUMENT

The court of appeals properly affirmed the Interstate Commerce Commission's decision adopting exemption procedures to reduce the burdens and delays associated with the abandonment of lines where no shippers will lose service. The court of appeals' holding does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners' principal argument relates to the rail transportation policy of 49 U.S.C. 10101a(9), concerning the need for cooperation with the states to assure that they regulate intrastate rail transportation in accordance with the Interstate Commerce Act. Specifically, petitioners complain (Pet. 8) that the ICC "voided" the notice period provided by Congress for abandonment proceedings. Their argument is based upon the incorrect premise that any deviation from the system of providing four months notice by marking a proposed abandonment on the system diagram map is improper. However, Section 10505 specifically authorizes the Commission to exempt carriers from any provision of the subtitle of Title 49 that governs interstate rail transportation.[3] There is nothing in the statute that precludes the agency from using its broad exemption authority to exempt carriers from the usual notice requirements for abandonment cases. Rather, as the court of appeals recognized (Pet. App. 17a), "the Commission's determina-

[3] There are two limited exceptions, which are not relevant here. 49 U.S.C. 10505(g) precludes the Commission from exercising the exemption authority "to authorize intermodal ownership that is otherwise prohibited [by the act]" or "to relieve a carrier of its obligation to protect the interest of employees * * *."

tion, predicated as it is on the agency's experience, is entirely in keeping with the deregulatory thrust of the Staggers Act."

In this case, the Commission did not eliminate notice altogether. Rather, the agency adopted alternative procedures to protect state interests. The Commission provided for 60 days' advance notice to states, during which time they can request that the exemption be revoked or conditioned to address a specific concern (49 C.F.R. 1152.50(d)). The Commission also retained the financial assistance procedures of 49 U.S.C. 10905 for exempted lines, allowing them to be purchased (by a state or other interested party) for their net liquidation value (see Pet. App. 108a; 49 C.F.R. 1152.27(h)(6)).[4] Thus, petitioners' argument is, at bottom, nothing more than a disagreement with the way in which the Commission decided to simplify and expedite the handling of this class of cases.

Moreover, the ICC adequately justified the method it selected. The ICC explained that although the states generally use rail plans as a blueprint of rail services necessary to support commercial interests crucial to a state's economy, lines generating no traffic are "unlikely to contribute to a State's business economy" (Pet. App. 106a) so as to be essential to a state's planning efforts; and that a state could monitor the activity on lines it considers crucial in order to anticipate abandonment proceedings (*ibid.*). The ICC also considered (*id.* at 107a) the fact that notice of an impending abandonment may

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[4] The procedures of 49 U.S.C. 10906 (public use conditions) and 16 U.S.C. 1247(d) (trails use) also remain available in these cases.

be provided to new shippers in ways other than by the system diagram map. Specifically, shippers could easily inquire with the carriers about future use plans before locating on a particular line. The ICC concluded (*ibid.*) that the minimal additional benefits of system diagram map notice did not outweigh the regulatory burden of maintaining the maps and thus delaying these needed abandonments. As the court of appeals found (*id.* at 16a), the Commission's corresponding selection of an expedited system of 60 days' notice is a "classic line-drawing choice" that is "reasonable." The Commission gave a "thorough and well-reasoned explanation" for its determination, as the court of appeals recognized, and the court properly declined to disturb it.

2. Contrary to petitioners' alternative contention (Pet. 8, 12-14), the court of appeals' determination that rail rates of non-market dominant carriers cannot be unreasonable does not conflict with the statute, nor with any decisions of other courts of appeals. The Act provides that a carrier's market dominance as to a particular rate does not create a presumption that the rate exceeds a reasonable maximum (49 U.S.C. 10709(c)).[5] It does not follow, however, as petitioners urge, that the statute contemplates that rates of non-market dominant carriers can be found to be unreasonably high. Rather, the fact that Section 10709(c)'s reach is limited to

[5] Rather, market dominance and the reasonableness of a rate are separate inquiries; the Commission will undertake the second inquiry only if it finds the first. *General Chemical Corp.* v. *United States*, 817 F.2d 844 (D.C. Cir. 1987) and *New England Power Co.* v. *United States*, 693 F.2d 239 (1st Cir. 1982), cited by petitioner, are both cases that recognize this principle.

the rates of carriers with market dominance indicates that the rates of carriers without market dominance are beyond the Commission's jurisdiction to regulate maximum reasonableness. See, *e.g.*, *New England Power Co.* v. *United States*, 693 F.2d 239, 244 (1st Cir. 1982) (evaluation of market dominance jurisdictional prerequisite to conduct of rate reasonableness proceedings). As the court of appeals explained (Pet. App. 12a), "[i]n the absence of such [market] dominance, * * * the statute assumes that competition in the marketplace will, as it were, 'regulate' rates; all rates outside a market-dominant setting are presumed to be reasonable [] and thus lawful[]."

In any event, as both the Commission and the court of appeals found, the exemption at issue here has nothing to do with a carrier's ability, obligation or incentive to make rate changes. As the ICC explained (Pet. App. 102a):

> Carriers are not required to maintain a certain advantageous rate absent abandonment or discontinuance; they can freely terminate their use of a particular rate base at any time, even without abandonment or discontinuance via application or exemption, merely by filing a revised tariff that otherwise complies with the Act. Conversely, carriers can preserve a rate advantage for shippers, even if they abandon or discontinue the route on which the rate was originally based, again simply by filing a tariff to that effect.

The prerogative of the carriers to practice short line ratemaking with or without this exemption—and with or without abandoning the line over which the rate is quoted—is protected by 49 U.S.C. 10701a, which

provides that carriers may charge any rate that is not specifically prohibited by the Act.

3. In sum, the court of appeals correctly determined that petitioners' arguments had no merit, and properly sustained the Commission's exercise of its broad discretionary exemption power. That decision is not in conflict with the decisions of other circuits, and does not present any question of broad importance that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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